

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal By)	SPB Case No. 32794
)	
ROBERT HERNDON)	BOARD DECISION
)	(Precedential)
From 3 working days' suspension)	
from the position of State)	NO. 94-07
Traffic Officer with the)	
California Department of Highway)	
Patrol at Fresno)	February 1, 1994

Appearances: John Markey, California Association of Highway Patrolmen, representing Appellant, Robert Herndon; Michelle Laird, Deputy Attorney General representing Respondent, California Department of Highway Patrol.

Before Carpenter, President; Stoner, Vice President; Ward, Bos and Villalobos, Members

DECISION

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of an Administrative Law Judge (ALJ) in an appeal by Robert Herndon (Herndon or appellant) from a three days' suspension from the position of State Traffic Officer with the California Department of Highway Patrol (Department). The ALJ found that appellant was guilty of inefficiency, inexcusable neglect of duty and misuse of state property and sustained the three days' suspension imposed by the Department.

The Board rejected the Proposed Decision of the ALJ and determined to decide the case itself, based upon the record,

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including the transcript, and the written and oral arguments of the parties.

After a review of the entire record, the Board revokes the adverse action.

FACTUAL SUMMARY

At the time of this adverse action, appellant had been employed by the Department for twenty-eight years. Appellant received one prior adverse action seven years previous to the present action for failing to properly secure his radio extender to his utility belt, causing the extender to fall to the ground. A radio extender is an electronic device which allows a CHP officer to communicate through his car radio while outside of the patrol car. The radio extender was damaged by passing traffic. Appellant was assessed a suspension of one working day.

On October 23, 1992, the appellant was on duty at 8:15 p.m. when he executed a routine traffic stop on Reed Avenue north of Lincoln. On this evening, appellant had difficulty transmitting on his radio extender. Instead of just turning it on and speaking into it, appellant had to remove the extender from his utility belt, take the battery off, and moisten the terminal to get it to work.

While appellant was writing a citation, a vehicle stopped across the road. A man and woman walked across the road and informed appellant that their car battery was getting weak,

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affecting their car lights. They asked appellant to follow them to town. Appellant told them to turn off their lights so the battery would recover while he finished writing the citation. When he finished the citation, appellant hurried across the road to tell the occupants of the impaired vehicle that he was ready to follow them off the road. However, just as he got to the other side of the road, the waiting vehicle moved out into traffic. Appellant quickly returned to his patrol vehicle, made a U-turn, and followed the vehicle with the low battery. Appellant was concerned that other traffic coming from behind would not observe the slow moving car with dimming lights.

After driving some two to three miles, appellant realized the extender was not on his belt. After appellant completed escorting the car with the low battery to town, appellant checked the patrol vehicle for the extender but did not locate it. He then made a U-turn and drove back to the location of the original stop. There he found the damaged extender on the side of the road.

Appellant believes he was putting the extender in the holder either as he was crossing the road toward the vehicle with the low battery or on the way back. The noise of passing traffic covered the sound of the extender hitting the pavement. Appellant called the Sergeant on duty and informed him of the incident. The extender was damaged beyond repair.

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Appellant's Sergeant recommended adverse action against appellant based on his belief that appellant had placed his extender on the roof of the patrol car and then driven off without securing it. The penalty recommended was a one working day suspension. Apparently, a one working day suspension is the discipline normally meted out by the Department when an officer is found to be guilty of inexcusable neglect of duty resulting in the loss or damage of a radio extender.

Appellant was charged with a violation of Government Code Section 19572 subdivisions, (c) inefficiency, (d) inexcusable neglect of duty, and (p) misuse of state property for the destruction of his state issued radio extender. The original recommendation was modified by the Department to a three working days' suspension because of appellant's prior adverse action for negligently losing his radio extender.

ISSUE

Did appellant's loss of his radio extender constitute inefficiency, inexcusable neglect of duty and/or misuse of state property under Government Code section 19572, subdivisions (c) (d) and (p)?

DISCUSSION

There is little dispute between the parties about the facts of this case. The Sergeant who originally recommended adverse action originally believed that appellant lost the extender

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because he left it on the roof of his vehicle. However, the Department did not charge appellant with this clearly negligent action. Instead, the Department charged appellant with failing to secure the extender to his utility belt "while walking across the roadway to assist a distressed motorist."

The Board has reviewed the facts of this case and finds that appellant is not guilty of any of the charges levied against him.

Inefficiency

Appellant's actions in losing the radio extender do not constitute "inefficiency." The Board addressed the meaning of inefficiency under Government Code section 19572, subdivision (c) in Robert Boobar (1993) SPB Dec. No. 93-21. In Boobar, as here, a CHP officer was charged with losing his radio extender. The Board held that the loss of Boobar's radio extender was not inefficiency because:

[i]nefficiency . . . generally connotes a continuous failure by an employee to meet a level of productivity set by other employees in the same or similar position. In some instances, an employee's failure to produce an intended result with a minimum of waste, expense or unnecessary effort may also constitute "inefficiency" for purposes of discipline under subdivision (c). Id. at 10-11.

In the instant case, as in Boobar, the charged misconduct cannot be construed as "inefficiency." The charge of inefficiency is dismissed.

Misuse of State Property

Appellant is charged with misuse of state property in connection with the loss and resulting destruction of his radio extender. The charge of misuse of state property was discussed in Boobar as follows:

The charge of "misuse of state property" under Government Code section 19572, subdivision (p) generally implies either the theft of state property or the intentional use of state property or state time for an improper or non-state purpose often, but not always, involving personal gain . . . "Misuse of state property" may also connote improper or incorrect use, or mistreatment or abuse of state property. Id. at 11-12.

In the present case, appellant's loss of his radio extender does not fall into any of the above categories nor has the Department set forth any rationale for including this loss under the heading of misuse of state property. The charge of misuse of state property is dismissed.

Inexcusable Neglect of Duty

Appellant was not inexcusably negligent in the performance of his duties the day the extender was damaged. The Department argues that appellant's actions fit under the rubric of inexcusable neglect of duty meaning "an intentional or grossly negligent failure to exercise due diligence in the performance of a known official duty" as defined in Gubser v. Dept. of Employment (1969) 271 Cal. App. 2d 240, 242 (emphasis added by respondent). Appellant's actions do not rise to the level of gross negligence. Appellant failed to secure the extender to his

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belt while hurrying to assist a distressed motorist. Appellant's actions constitute minor carelessness at most.

Nor can the Board say on these facts that appellant's actions were inexcusable. Appellant's hurried actions were sincerely motivated by his intention to protect a distressed motorist.¹ The charge of inexcusable neglect of duty is dismissed.

Considering the nature of the conduct, we find the fact that appellant had failed to secure a radio extender seven years earlier, an incident too remote in time to have relevance to this case.

CONCLUSION

For all of the reasons set forth above, the adverse action of three days' suspension is revoked.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case and pursuant to Government Code Sections 19582 and 19584, it is hereby ORDERED that:

1. The adverse action of a three days' suspension is revoked.

¹This is not to say that the loss of a radio extender may never rise to the level of inexcusable negligence. It is just that these facts do not support such a finding.

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2. The California Highway Patrol shall pay to appellant Robert Herndon all back pay and benefits that would have accrued to him had he not been suspended.

3. This matter is hereby referred to an Administrative Law Judge and shall be set for hearing on written request of either party in the event the parties are unable to agree as to the salary and benefits due appellant.

4. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD

Richard Carpenter, President
Alice Stoner, Vice President
Lorrie Ward, Member
Floss Bos, Member
Alfred R. Villalobos, Member

* * * * *

I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on February 1, 1994.

GLORIA HARMON
Gloria Harmon, Executive Officer
State Personnel Board